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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 779

JAMES F. SHORT, STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON, MARK O. HATFIELD and ROBERT Y. THORNTON,

Appellants,

v.

NESS PRODUCE CO., an Oregon corporation,

Appellee.

JURISDICTIONAL STATEMENT

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Appellants,

v.

NESS PRODUCE CO., an Oregon corporation,
Appellee.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Oregon, entered on July 25, 1966, holding a statute of the State of Oregon unconstitutional and enjoining enforcement of such statute, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The majority opinion rendered July 25, 1966 and signed by Walter Ely, Circuit Court Judge, and Gus J. Solomon, District Court Judge, is not yet reported and was declared to also be the findings of fact and conclusions of law. Copies of said opinion and judgment order are attached hereto as Appendix A.

The dissenting opinion rendered July 20, 1966 and signed by Fred M. Taylor, District Court Judge, is not yet reported. A copy of said opinion is attached hereto as Appendix B.

JURISDICTION

This cause was instituted by the appellee by virtue of the provisions of 28 USC #2284 and a three-judge court was empanelled by virtue of the provisions of 28 USC #2281. The basis of said cause was to declare an Oregon statute unconstitutional and to enjoin enforcement of the same. The constitutional provisions relied upon by the appellee are Article I, section 8, of the United States Constitution, Article VI of the United States Constitution and the XIV Amendment to the United States Constitution. A copy of the complaint is attached hereto as a part of Appendix A.

The judgment order of the District Court was made and entered on July 25, 1966 and notice of appeal was filed in that court on September 21, 1966.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Loeb v. Trustees of Columbia Tp.*, (1900) 179 US 472; *Radio Corp. of America v. United States,* (1950) 341 US 412; cf *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* (1960) 362 US 73; *Zemel v. Rusk,* (1965) 381 US 1, rehearing denied 382 US 873.

STATUTES INVOLVED

The statute of the State of Oregon subjected to attack herein is officially designated as Chapter 150, Oregon Laws

1965, and is found in the Oregon Revised Statutes as ORS 619.910 and ORS 619.990 (8). A copy of said statute is attached hereto as Appendix C.

The trial court herein having, in its majority opinion, stated that a prior similar federal District Court opinion was influential, reference is also made to the holding in *Tupman Thurlow Co. v. Moss,* 252 F Supp 641 (M.D. Tenn. 1966). This opinion is attached hereto as Appendix D. The Tennessee statutes there under attack are officially designated as Chapter 34, 1965 Public Acts of Tennessee and Chapter 367, 1965 Public Acts of Tennessee, and are attached hereto as a part of Appendix D.

QUESTIONS PRESENTED

The following questions are presented upon this appeal:

(1) Is a legislative enactment of a state requiring wholesalers and retailers doing business within Oregon of fresh or frozen meat originating in a foreign country to label such as to country of origin, post signs in their establishments that meat of foreign origin is dispensed, and keep records of transactions involving such meat, create such a burden and interference with interstate and foreign commerce so as to be subjected to the judicial doctrine declared in *Baldwin v. G.A.F. Seelig, Inc.,* (1934) 294 US 511, and thus in contravention of the Commerce Clause, Article I, Section 8 of the United States Constitution, or is such burden within the consideration of the doctrine set forth in *Savage v. Jones,* (1905) 225 US 501, and thus valid?

(2) Does the inherent sovereign, police power of the several states include the power to require truthful disclosure

by its merchants of the source of origin of their fresh or frozen meats so as to advise the consuming public of such source and thereby protect the consumers from deception and allow them a free choice of product, regardless of quality considerations as declared in *F.T.C. v. Algoma Lumber Co.*, (1939) 291 US 67?

(3) Is a state law requiring disclosure by merchants of the source of origin of fresh or frozen meats to consumers of the state an unreasonable and arbitrary classification of product so as to be in contravention of the Equal Protection Clause, the Fourteenth Amendment to the United States Constitution?

(4) Have Acts of Congress, treaties and foreign trade agreements so pre-empted this area of governmental regulation so as to preclude the several states from enacting laws protecting a state's consuming public against deception as to source of origin of imported meats?

STATEMENT

In this instant cause the following acts are agreed and undisputed. The appellee is an Oregon corporation doing business in Oregon as a distributor of food products, including the product here in question, namely, imported meat, principally beef, of foreign origin. Its principal place of business is located in Portland, Oregon, and its consumers are within the Portland, Oregon area.

The appellants are the individuals and entity chargeable by Oregon law with the responsibility of enforcement of the provisions of the statute in question.

As above stated, the foodstuff in question is principally

beef although small quantities of mutton and veal are also imported. The primary sources of such imports are Australia and New Zealand. Imported meat is frozen before shipment from the exporting country due to the logistics involved and remains in this condition for approximately two months until utilized by the local retailer or processor in the United States. The meat is deboned and packaged in sixty pound boxes in the exporting country and, again, remains in such condition until utilized by the local retailer or processor in the United States. An inspection system in the exporting countries has been established by the exporting countries' officials and the imported packages are inspected by United States authorities as to wholesomeness and fitness for human consumption by a statistical sampling program, and if found to be acceptable it is stamped with a federal inspection stamp. Pursuant to Acts of Congress the imported packages of frozen meat are marked with the country of origin, but of course this disclosure of source of origin ceases to exist when the Oregon retailer unpacks and thaws such meat and mixes, grinds or sells the same to the Oregon consumer. The labeling requirement of this Oregon statute, however, on a wholesale level, is necessarily met due to the labeling requirements of the federal Tariff Act of 1930.

The appellee purchases its supply of foreign, frozen meat through or from importers, taking possession of the same at Portland, Oregon. The meat is retained in its frozen, imported packages at the time of delivery and sale to various retailers in the Portland, Oregon area.

The retailers, as customers of the appellee, advised that they would discontinue purchasing the imported frozen beef if

the Oregon statute herein involved became effective. Their principal complaint was that retail customers would ask questions and their stores would be considered by such customers as handling inferior products. Secondarily, the retailers mentioned the inconvenience and expense of additional labeling and record keeping.

The primary usage of the imported frozen beef by the appellee's customers was ground beef wherein domestic fat scraps were mixed with the imported lean meat.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Approximately forty percent of the states, extending from the East to the West Coast, and from Mexico to Canada[1] have enacted laws similar to the Oregon statute under attack, since federal labeling requirements did not offer protection to the ultimate retail consumer. Some of such include labeling, sign posting and licensing while others exclude licensing; some include all meats whether fresh, frozen, cooked or otherwise processed while others, as Oregon, limit regulation to fresh and frozen meats. In addition to the instant cause and the above cited Tennessee cause, there is presently being heard a similar case in the United States District Court for the Southern District of Iowa, Central Division, entitled *International Packers, Ltd. v. Hughes,* et al, case #6-1724-C-1. This cause is also an attack on the Iowa statute of similar nature.

The appellants have recently received advice that seven of

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[1] The following states have so acted: Arizona, Arkansas, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas and Wyoming.

the other eighteen states desire to join with the present appellants in their brief or petition this Court to appear amicus curiae. It is apparent from the brief and documents filed in the Tennessee cause, above cited, by the United States government, which documents were and are part of the trial record herein, that the federal government has great interest and concern with a determination of the questions herein presented.

2. As will be noted in the trial court opinion (Appendix A) the doctrine set forth in *Baldwin v. G.A.F. Seelig, Inc.*, 294 US 511 (1934), was applied herein on the basis that the Oregon Act resulted in insulating the Oregon citizens from outside competition. It is submitted that this doctrine cannot and should not have application to state labeling laws relating to source of origin. The *Baldwin* decision was clearly based upon the express purpose of the New York law in question: to protect New York milk producers. This is evidenced by the statement of Justice Cardozo:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the *avowed purpose* of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of its hypothesis." (Emphasis supplied)

The *Baldwin* decision did not prohibit state police power to protect against consumer deception, but in fact recognized the valid existence of such power in stating at page 525:

> ". . . So a state may protect its inhabitants against fraudulent substitution, by deceptive coloring, or *otherwise*, of one article for another." (Emphasis supplied)

This Court should necessarily clarify the limitations of the Baldwin decision in this area of state commercial regulation,

particularly in light of other decisions of this Court commented on below.

3. The oft cited case of *Savage v. Jones,* 225 US 501 (1912), held a state statute valid which required labeling on animal feed, finding the aim was not at interstate commerce but to prevent consumer fraud and deception. This doctrine has been accepted and applied in subsequent decisions of this Court unto the present time as evidenced in *Standard Stock Food Co. v. Wright,* 225 US 540 (1911); *Hutchinson Ice Cream Co. v. Iowa,* 242 US 153, (1916); *Hebe v. Shaw,* 248 US 297 (1916); and *Armour & Co. v. North Dakota,* 240 US 510 (1916), and very recently in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 US 132 (1963). The doctrine gleaned from such decisional law was succinctly expressed by this court in the *Standard Stock Food* case, at page 549:

> "It was competent for the state, in the exercise of its police power to prevent imposition upon the public, to require the disclosure to which objection is made. The provision was not an unreasonable one and the effect upon interstate commerce was incidental only."

It is submitted that it is within the framework of this doctrine that the case of *Huron Portland Cement Co. v. City of Detroit,* 362 US 440 (1960), cited in the majority opinion of the trial court, has valid application. At pages 448 and 449 of such decision the Court stated:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce . . . never intended to cut the state off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the

> country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

4. The fact that additional expense may be incurred in order to comply with such state labeling laws has been held by this Court not to invalidate such laws as an undue burden on interstate commerce. In *Day-Brite Lighting v. State of Missouri,* 342 US 421 (1952) the Court disposed of the Commerce Clause argument stating:

> "Of course, many forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. These are part of the costs of our civilization."

In this regard the same principle was applied in *Plymouth Coal Co. v. Com.,* 232 US 531 (1913) and *Armour & Co. v. North Dakota,* 240 US 510 (1916). This Court should declare the limitations of "cost of compliance" as a factor in determining whether interstate or foreign commerce is unduly burdened thereby.

5. As recent as 1964 a state court had occasion to consider and apply the *Savage v. Jones* doctrine as reiterated in the *Florida Lime & Avocado Growers, Inc. v. Paul* decision. In *Pacific Meat Co. v. Otagaki,* 349 P2d 618 (Hawaii 1964) a State of Hawaii law required labeling of all uncooked poultry products as to geographic origin, either as "Mainland Grown," "Foreign Grown" or "Local Grown." In determining constitutional issues raised therein, the court, in reliance upon the above holdings of this Court, held the Act constitutional

in all respects stating that the purpose of such was to protect the consumer against deception inasmuch as a large portion of the imported poultry was received in frozen form, then thawed and sold as fresh poultry.

This Court should determine application of the state's police power as related to consumer protection against deception in the area of imported goods. The above Hawaiian court did just that and a clear conflict exists between its holding and that of the instant trial court upon this issue.

6. In determining whether a statute violates the Fourteenth Amendment to the United States Constitution, existing facts and circumstances are considered. The imported meats, frozen for extended periods prior to any offering for sale to consumers as fresh meat, the methods of marketing of such meats and the general consumer attitudes are all facts and circumstances which must be considered. The mere fact that a legislature regulates one phase or area of commerce does not of itself render a statute unconstitutional as a violation of the Fourteenth Amendment. As stated in *Puget Sound P. & L. Co. v. Seattle,* 291 US 264 (1934):

> "The equal protection clause does not forbid discrimination with respect to things that are different."

As recent as 1954 this Court in *Salsburg v. Maryland,* 346 US 545, affirmed the view that legislatures have a liberal license in exercising a state's police power. See also: *Alabama State Federation of Labor v. McAdory,* 325 US 450 (1944); *Semler v. Oregon Dental Examiners,* 294 US 608 (1935); and *Price v. Illinois,* 238 US 446 (1915).

The distinction in application of the above decisions to the instant cause from the doctrine established in the case of

Minnesota v. Barber, 136 US 313 (1890), cited in the trial court's majority opinion herein, should be made.

7. The Supremacy Clause as related to Acts of Congress does not invalidate state laws of this nature because of preemption unless the power is exclusively lodged in the federal government or unless the power, in light of the nature of the subject matter, must necessarily be exercised by the federal government. The first proposition surely has no direct application as both the federal government and state governments have historically and continuously exercised concurrent jurisdiction over labeling legislation. The prescribed judicial test related to the second proposition is, as stated in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 US 132 (1963), whether both regulations may be enforced without impairing the federal superintendence of the field. As stated therein:

> "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end."

This is a reiteration of the long standing concept stated in *Thurlow v. Massachusetts,* 46 US 504 (1847), that there must be a showing of clear, unequivocal, direct conflict between the state and federal enactments. The Tariff Act of 1930, as amended, particularly Section 1304 governs labeling of country of origin and demands this be accomplished for the purpose of informing the "ultimate purchaser" of the exact nature of the product he is purchasing. However, the "ultimate purchaser" is federally defined as the one receiving the product in its imported form. In the instant cause this is the retailer, not the Oregon consumer. The Oregon statute is supplementary and extends this same protection against deception

to the "consumer purchaser." No conflict is rationally found to exist, and thus the pre-emption argument must fail.

The Supremacy Clause as related to foreign trade agreements and treaties does not invalidate such state laws unless an express limitation or prohibition is expressed therein or a clear conflict is shown to exist. *Guaranty Trust Co. of New York v. United States,* 304 US 126 (1938). The appellee has relied upon the provisions of the General Agreement on Tariffs and Trade (GATT), Vol. 61-62, U.S. Statutes at Large (1947). This trade agreement specifically recognizes the sovereign right to demand disclosure of origin of products and deals with this subject because of such recognition. The trial court saw fit not to determine these Supremacy Clause arguments, but it is submitted that a determination must be made so both federal and state authorities realize the limitations, if any, of such Congressional Acts, treaties and foreign trade agreements.

8. This is the age of consumer protection laws, honesty in lending laws, truth in packaging laws and full disclosure laws. The Oregon Act is just such a consumer protection law. Nondisclosure is as inherently deceptive as mislabeling. The total impact of the legislative acts and judicial decisions may be summed up in one word, "Truth."

With the number of states having considered and effectuated laws of this nature and with the divergency of judicial views as to controlling concepts related to state police power, the Commerce Clause and the Supremacy Clause as applied to the validity question of such laws, it is submitted that this Court should undertake to establish the principles applicable.

CONCLUSION

It is requested that this Court note plenary jurisdiction of this matter with the submission of briefs and presentation of oral arguments.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NESS PRODUCT CO., an Oregon corporation, Plaintiff, vs. JAMES F. SHORT, Director of Agriculture of the State of Oregon; STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON; MARK O. HATFIELD, Governor of the State of Oregon; and ROBERT Y. THORNTON, Attorney General of the State of Oregon; and their respective successors in office and servants, agents, employees and representatives of their departments, and all others acting on their behalf or in concert with them, Defendants.	Civil Action No. 65-405 COMPLAINT

Plaintiff for a cause of action against the defendants complains and alleges as follows:

I.

That at and during all the times hereinafter mentioned plaintiff was and now is a corporation organized and existing

under the laws of the State of Oregon, with its principal place of business located within the State of Oregon.

II.

That at and during all the times hereinafter mentioned defendant JAMES F. SHORT was and is now the duly appointed and acting DIRECTOR OF THE DEPARTMENT OF AGRICULTURE of the State of Oregon and was and now is charged with the duties and responsibilities of administering said Department of Agriculture and enforcing of those statutes which the Legislature has directed to be enforced by said Department of Agriculture, and was and is now a resident of the State of Oregon; that at and during all the times hereinafter mentioned defendant MARK O. HATFIELD was and now is the duly elected and acting GOVERNOR OF THE STATE OF OREGON and was and is now a resident of the State of Oregon; that at and during all the times hereinafter mentioned defendant ROBERT Y. THORNTON was and now is the duly elected and acting ATTORNEY GENERAL OF THE STATE OF OREGON and was and now is a resident of the State of Oregon; and that Chapter 150, Oregon Laws 1965, directs that provisions of said Chapter shall be enforced by the State Department of Agriculture.

III.

Plaintiff's cause of action arises under the Constitution of the United States, Article I, Section 8, and Article VI, as hereinafter more fully set forth. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

IV.

Plaintiff was and now is doing business in Oregon as a distributor of fresh or frozen meat which is produced in a foreign country and imported into the United States, and plaintiff's business is therefore conducted in foreign and interstate commerce. Plaintiff purchases said meat from importers while said meat is still in its original package. Shipment thereof is made directly to plaintiff from the foreign country or by shipment into the State of Washington or State of California and then to plaintiff. All of said imported meat remains in its original package until such time as plaintiff's customers mix, manufacture or process said meat into various meat products for resale to the ultimate consumer.

V.

That at and during all the times hereinafter mentioned plaintiff was and now is conducting its business in complete compliance with the laws of the United States of America. Said imported meat is imported within the quotas on foreign meat established by Public Law 88-482, 88th Congress, H.R. 1839, August 22, 1964, 78 Stat. 594; said meat is marked and labeled as required by the Tariff Act of 1930, as amended, 19 U.S.C.A. 1304(a); and said meat is thoroughly inspected both in this country and in the foreign country where produced for cleanliness and wholesomeness pursuant to the inspection procedures conducted by the United States Department of Agriculture under the applicable laws of Congress (the Meat Inspection Act, 21 U.S.C.A., Sec. 71 et seq.) and the regulations issued pursuant thereto.

VI.

The 53rd Legislative Assembly of the State of Oregon en-

acted Chapter 150, Oregon Laws 1965, which was approved by the Governor of the State of Oregon and filed in the office of the Secretary of State of the State of Oregon on April 8, 1965, and will become law and effective on August 13, 1965. Said Chapter 150 provides, among other things, that no person shall sell or offer for sale at wholesale or retail for consumption on the premises, or otherwise, any fresh or frozen meat produced in a foreign country unless:

(a) There is displayed conspicuously upon the busines premises a sign or signs indicating such meat is imported;

(b) Each package displayed for sale, each cut and each quarter, half or whole carcass of such meat is labeled or branded to indicate the country of origin.

Said Chapter 150 also requires a seller to keep records of sales of imported meat and renders violation of the provisions of said Chapter 150 a misdemeanor. A certified copy of said Chapter 150 is attached hereto, marked EXHIBIT "A", and by this reference made a part hereof the same as though set forth in full herein.

VII.

That in anticipation and preparatory to complying with the provisions of said Chapter 150, Oregon Laws 1965, the STATE DEPARTMENT OF AGRICULTURE of the State of Oregon and JAMES F. SHORT, DIRECTOR OF AGRICULTURE of the State of Oregon, defendants herein, have promulgated proposed rules as provided for in Section 4 of said Chapter 150, a copy of which is attached hereto, marked EXHIBIT "B", and by this reference made a part hereof the same as though set forth in full herein.

VIII.

That the requirements of Chapter 150, Oregon Laws 1965 and said rules impose an extreme and unreasonable burden upon plaintiff and plaintiff's customers and since the enactment thereof and as a direct result of said enactment, plaintiff has been and will be unable to sell any of its imported meat to its regular customers in the State of Oregon. Plaintiff's customers refuse to comply with the requirements of said Chapter 150 and said rules and therefore will no longer purchase imported meat. The enactment of Chapter 150, Oregon Laws 1965, and publishing of said rules has therefore caused plaintiff a real, immediate, substantial, continuing and irreparable injury due to the loss of this business which amounts to more than $10,000.

IX.

That the requirements of Chapter 150, Oregon Laws 1965, and published rules interrupt, impede and prevent the free flow of plaintiff's goods in foreign and interstate commerce in the State of Oregon and have created an effective embargo against the sale by plaintiff of its imported meat within the State of Oregon. The labeling requirements of said statutes constitute an unreasonable burden upon the foreign and interstate commerce in which plaintiff is engaged and are therefore a violation of the commerce clause of the Constitution of the United States of America, Article I, Section 8.

X.

The Congress of the United States has enacted the Tariff Act of 1930, as amended (19 U.S.C.A. Sec. 1304, 1306(b)), the Meat Inspection Act (21 U.S.C.A. Secs. 71 et seq.), the Act of June 30, 1906, commonly called the Meat Inspection

Amendment (34 Stat. 674), the Act of June 30, 1906, commonly called the Food and Drugs Act (34 Stat. 768), and Public Law 88-482, 88th Congress, H.R. 1839, August 22, 1964 (78 Stat. 594), and in 1947 ratified the Multi-Nation Pact entitled The General Agreement on Tariffs and Trade, to which Australia was also a party. The above statutes and treaty constitute a complete preemption by Congress of the field of regulation of meats imported into the United States and the express intent to preclude any regulation thereof by the individual states. Any attempt to regulate meats imported into the United States is therefore void under the supremacy clause of the Constitution of the United States, Article VI.

WHEREFORE, plaintiff prays:

1. That Chapter 150, Oregon Laws 1965 be declared unconstitutional and void.

2. That the defendants, and each of them, their successors in office, and servants, agents, employees and representatives of their departments, and all others acting on their behalf or in concert with them, be restrained and enjoined from enforcing the provisions of Chapter 150, Oregon Laws 1965, and all rules and regulations promulgated thereunder.

3. That plaintiff be granted judgment against the defendants, and each of them, for its costs and disbursements made and incurred herein.

4. That the plaintiff be granted such other and further relief as to the Court may seem equitable.

DAVIS, JENSEN, MARTIN & ROBERTSON
DONALD J. DeFRANCQ
By THEODORE B. JENSEN
Of Attorneys for Plaintiff

STATE OF OREGON)
) ss.
County of Multnomah)

I HEREBY CERTIFY that I have prepared the foregoing copy of Complaint and have carefully compared the same with the original thereof and that it is a correct copy therefrom and of the whole thereof.

THEODORE B. JENSEN
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NESS PRODUCE CO., an Oregon corporation, Plaintiff, vs. JAMES F. SHORT, Director of Agriculture of the State of Oregon; STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON; MARK O. HATFIELD, Governor of the State of Oregon; ROBERT Y. THORNTON, Attorney General of the State of Oregon; and their respective successors in office and servants, agents, employees and representatives of their departments, and all others acting on their behalf or in concert with them, Defendants.	)	Civil Action No. 65-405 JUDGMENT

Based upon the findings of fact and conclusions of law as set forth in the opinion of the Court filed this day,

IT IS ORDERED AND ADJUDGED:

1. That Chapter 150, Oregon Laws 1965, is declared unconstitutional;

2. That defendants, and each of them, their successors in office, and all others acting on their behalf are enjoined from enforcing the provisions of Chapter 150, Oregon Laws 1965, and all rules and regulations promulgated thereunder.

Dated this 25th day of July, 1966.

WALTER ELY
Circuit Judge

District Judge

GUS J. SOLOMON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF OREGON

NESS PRODUCE CO., an Oregon corporation, Plaintiff, vs. JAMES F. SHORT, Director of Agriculture of the State of Oregon; STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON; MARK O. HATFIELD, Governor of the State of Oregon; ROBERT Y. THORNTON, Attorney General of the State of Oregon; and their respective successors in office and servants, agents, employees and representatives of their departments, and all others acting on their behalf or in concert with them, Defendants.	)	Civil Action No. 65-405 OPINION

Before: ELY, Circuit Judge, and SOLOMON and TAYLOR, District Judges.

PER CURIAM:

Plaintiff, Ness Produce Co., filed this action to enjoin defendants from enforcing Chapter 150, Oregon Laws 1965, which requires the labeling of imported meat. Defendants are the officials and agency of the State of Oregon charged with enforcing the statute.

Chapter 150 was enacted on April 7, 1965, and became law on August 13, 1965. Upon stipulation of the parties, a preliminary injunction was granted, pending our disposition of this case.

Chapter 150 proscribes the wholesale and retail sale of

fresh or frozen meat[8] produced in a foreign country unless the seller (1) displays a sign upon his premises indicating that he sells imported meat and (2) labels each package, cut, and carcass of meat with the country of origin. It requires sellers to keep accurate records of all sales of imported meat and delegates enforcement and rule-making to the State Department of Agriculture. Violation of the act is a misdemeanor.[9]

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[8] The parties agree that Chapter 150 does not apply to imported meat and meat products which are cured, canned, dried or cooked.

[9]

CHAPTER 150

AN ACT

Relating to foreign meat; and providing penalties.

Be It Enacted by the People of the State of Oregon:

Section 1. The purpose of sections 2 to 4 of this Act is to protect the consumers of this state in their choice of meat for consumption.

Section 2. No person shall sell or offer for sale at wholesale or retail, for consumption on the premises or otherwise, any fresh or frozen meat produced in a foreign country unless:

(a) There is displayed conspicuously upon the business premises a sign or signs indicating such meat is imported.

(b) Each package displayed for sale, each cut and each quarter, half and whole carcass of such meat is labeled or branded to indicate the country of origin.

Section 3. Persons selling meat described in section 2 of this Act shall keep accurate records of such sales and keep such records for one year and open for inspection by the State Department of Agriculture during regular business hours.

Section 4. (1) The State Department of Agriculture shall enforce sections 2 and 3 of this Act and the rules made under this section.

(2) The State Department of Agriculture shall by rule provide:

(a) The size, content and placement of signs, labels and brands required under section 2 of this Act.

(b) The content of records required under Section 3 of this Act.

(3) No person shall violate any provision of a rule adopted under this section.

Section 5. Violation of any provision of sections 2 to 4 of this Act is a misdemeanor.

Administrative regulations require every seller of imported meat to post signs containing the following wording:

(a) FOREIGN MEAT SOLD HERE (or)
(b) IMPORTED MEAT SOLD HERE.

The lettering on such signs must be at least four inches high, of a heavy, positive block style, and of a color easily read. Retailers must post one sign for every 27 running feet of customer meat counter; other sellers must post at least one sign in the main office where it can be seen and will be most conveniently read by customers.

The regulations require that packages of meat be conspicuously labeled:

(a) IMPORTED FROM (name of foreign country) (or)
(b) PRODUCED IN (name of foreign country).

This label must appear on top of the package if other wording is on top. The lettering must be in heavy, block-faced type at least three-eighths inches high, but not less than one-half the size of the largest lettering on the package. Carcasses and wholesale cuts of meat must be labeled or branded in similar fashion.

The regulations also require that sellers keep separate records showing the kind, amount, and source or destination of all imported meat purchased or sold, except that retailers need not record the names and addresses of ultimate consumers.[9]

Plaintiff distributes in the Portland area, boned and

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[9] The regulations of the State Department of Agriculture are contained in Administrative Order AD 801, promulgated August 16, 1965, and filed in the office of the Secretary of State. ORS 183.020.

frozen lean beef imported primarily from Australia. It imports this beef in 60-pound packages and resells it to meat processors and retailers in the same packages. This lean beef is not suitable for use as table beef (roasts and steaks) because of its low fat content. It is chiefly used in conjunction with table beef trimmings to make hamburger and sausage products.

Imported meat is inspected twice under federal supervision, once in the country of origin and again on its arrival in this country. 19 U.S.C. § 1306(b); 21 U.S.C. §§ 71-91; 9 C.F.R. §§ 27.1-27.21. Defendants concede that plaintiff's imported meat is healthful, wholesome, and fit for human consumption.

Plaintiff contends that Chapter 150 constitutes an effective embargo against the importation into Oregon of fresh and frozen meat produced in foreign countries, because it imposes discriminatory costs on sellers of imported meat and because it carries the unwarranted connotation that imported meat is inferior to domestic meat. Plaintiff asserts that Chapter 150 is void and unenforceable because (a) it is not a valid exercise of the police power; (b) it conflicts with the laws and treaties of the United States; (c) it violates the Commerce Clause of the United States Constitution; and (d) it violates the equal protection clause of the Fourteenth Amendment.

Preliminarily, defendants contend that this case is not properly before a three-judge court, since it presents an issue under the Supremacy Clause. Standing alone, a Supremacy Clause issue will not sustain the jurisdiction of a three-judge court. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). Where there is a substantial challenge to the constitutionality of a

state statute, a three-judge court is necessary, 28 U.S.C. § 2281, and the court has jnurisdiction over non-constitutional issues as well. *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1960). In our view, plaintiff has raised significant constitutional issues, and our jurisdiction is proper.

We hold that Chapter 150 unreasonably discriminates against imported meat in violation of the Commerce Clause. We need not decide whether the labeling required by the Act will discourage ultimate consumer purchases of imported meat. The substantial costs of labeling and record-keeping which the Act imposes on sellers of imported meat have an obvious and direct impact on interstate commerce.

State-imposed burdens on interstate commerce are valid, if at all, only where the State acts under its inherent police power to protect the life, liberty, health or property of its citizens. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960). Defendants argue that Chapter 150 is necessary to protect the consuming public from "deception, unfair trade practices, and fraud." However, defendants concede that imported meat is wholesome, and that it is neither organically nor qualitively different from domestic meat. Nothing in the record indicates that sellers of imported meat are pawning off an inferior product. Even if they were, the labeling requirements of Chapter 150 do not relate to the quality of the product, but only to its place of origin.[9]

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[9] Defendants suggested that labeling under Chapter 150 alerts a consumer to the fact that the meat, if sold in a thawed state, was previously frozen. Chapter 150 makes no reference to freezing, however. It it did, it would be patently discriminatory, since it does not require the labeling of similarly frozen domestic meat. See *Minnesota v. Barber,* 136 U.S. 313 (1890).

Chapter 150 is one of seventeen similar statutes enacted primarily in beef producing states in the last three years. The legislative history of Chapter 150 clearly shows that it was enacted in response to the growing volume of beef imports and was designed primarily to provide economic protection to Oregon cattlemen. The statute reflects the draftsmen's purpose, for it operates primarily, if not exclusively, to burden and make difficult the sale of imported meat. The administrative regulations, while not controlling here, confirm the true purpose of the statute.

We hold that a State exceeds the limits of its police powers when it acts to insulate its citizens from outside competition. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1934); *Brimmer v. Redman*, 138 U.S. 78 (1891). Chapter 150, Oregon Laws 1965, is void and unenforceable because it conflicts with Article I, Section 8, of the United States Constitution. In arriving at this conclusion, we have been influenced by the opinion in *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966). There, the Court held that Tennessee's substantially similar labeling act ran afoul of the Commerce Clause.[6]

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[6] Chapter No. 34
1965 Public Acts of Tennessee

An Act requiring proper identification of imported meat when offered for sale in this state and requiring identification on bids of meat producers to state institutions and providing penalties for violations thereof.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That any person, firm or corporation who sells or offers for sale in the State of Tennessee, through packing houses, meat markets, stores, or otherwise, any meats, meat-foods, either fresh, canned, frozen or cured, which are products of any foreign country

(Continued on page 29)

Because we base our decision upon the Commerce Clause, we do not consider the other grounds upon which plaintiff attacks Chapter 150.

This opinion will serve as findings of fact and conclusions of law under Rule 52(a), Fed. R. Civ. P.

Dated this 25th day of July, 1966.

WALTER ELY
Circuit Judge

District Judge

GUS J. SOLOMON
District Judge

(Continued from page 28)

to the United States, shall so identify each product and its foreign origin.

Section 2. *Be it further enacted,* That each quarter of each carcass, each carton, each retail package, or individually packaged item shall be plainly identified with a brand or label stating that it is a foreign product and naming the country of its origin. If any product offered for sale in bulk or portions whereby labeling is not feasible, then a conspicuous sign in lieu of the label shall be displayed near the stock or display of the product. When foreign meats are combined with domestically produced meats into one (1) product, it shall be so labeled. In addition, should preservatives of any kind be used in any packaged meat product, the preservative shall be identified, along with the quantity used, and clearly displayed on any such packaged.

Section 3. *Be it further enacted,* That all bids submitted on meat and meat products to any tax-supported institution within this State shall contain the following language: "This meat is of foreign origin," or "This is a combination of foreign and domestic meats." And said institution is hereby authorized to reject said bid.

Section 4. *Be it further enacted,* That the State Commissioner of Agriculture is responsible for the administration of this Act. In the performance of his duties thereof the Commissioner is authorized, empowered and directed to make and promulgate regulations to effectuate

(Continued on page 30)

(Continued from page 29)

the provisions of this Act, but none of said regulations shall require a higher standard of purity and sanitation than is from time to time required by the regulations of the United States Department of Agriculture to govern meat inspection by its agricultural research service.

Section 5. *Be it further enacted,* That this Act and any portion hereof shall not be construed as to be in conflict with Chapter 9 of Title 52 of the Tennessee Code Annotated, but rather as supplementary thereto.

Section 6. *Be it further enacted,* That any person, firm or corporation who shall fail to comply with the provisions of this Act and any portion thereof shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00), or to be imprisoned in the county jail not more than thirty (30) days for the first offense. For each second or successive conviction of such offense against the provisions of this Act, the fine shall be not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) nor more than ninety (90) days imprisonment in the county jail, or both such fine and imprisonment.

Section 7. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable, and if any of its sections, provisions, clauses, or parts be held unconstitutional or void, then the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

Section 8. *Be it further enacted,* That this Act shall take effect from and after July 1, 1965, the public welfare requiring it.

Passed: February 16, 1965.

Jared Maddux,
Speaker of the Senate,

William L. Barry,
Speaker of the House of Representatives.

Approved: February 24, 1965.
Frank G. Clement,
Governor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NESS PRODUCT CO., an Oregon corporation, Plaintiff, vs. JAMES F. SHORT, Director of Agriculture of the State of Oregon; STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON; MARK O. HATFIELD, Governor of the State of Oregon; ROBERT Y. THORNTON, Attorney General of the State of Oregon; and their respective successors in office and servants, agents, employees and representatives of their departments, and all others acting on their behalf or in concert with them, Defendants.	)	Civil Action No. 65-405 OPINION

Before: ELY, Circuit Judge, and SOLOMON and TAYLOR, District Judges.

TAYLOR, District Judge, Dissenting:

The majority of this three-judge court have concluded that Chapter 150, Oregon Laws 1965 is in violation of the Commerce Clause of the United States Constitution.

Under the facts of this case and the authorities relied on, as I understand them, I am unable to agree with the majority.

The Act in question was enacted under and pursuant to the police power of the State of Oregon with the intent and

for the purpose of protecting the consuming-purchasing public against deception. The evidence reveals that the principal objection to the enforcement of the law is the apprehension on the part of the retailers of meat that the public would become aware of the fact that they are selling foreign or imported meat together with domestic meat which might result in loss of business. It is clear that by not divulging the true facts, the retailers are now pawning off to the consumer foreign meat, imported in a frozen state, as domestic meat. It is my opinion that under its police power the State of Oregon not only has the right but the duty to protect its citizens from such deception.

I do not believe the evidence is sufficient to justify the holding that the enforcement of this Act would unreasonably burden interstate or foreign commerce so as to violate the Commerce Clause of the Constitution of the United States.

Dated at Boise, Idaho, this 20th day of July, 1966.

FRED M. TAYLOR
United States District Judge

APPENDIX C

FIFTY-THIRD LEGISLATIVE ASSEMBLY
REGULAR SESSION

Enrolled

HOUSE BILL 1797

Introduced by Representatives MANN, SMITH, Senator YTURRI, Representatives BAZETT, BEDINGFIELD, BENNETT, BESSONETTE, BRANCHFIELD, DAY, DETERING, FLITCRAFT, GROENER, GWINN, HANSELL, HARLAN, HOWARD, HOWE, HOYT, SAM JOHNSON, LEWIS, McKINNIS, MUSA, OUDERKIRK, PAXSON, PECK, Senators AHRENS, BOIVIN, FLEGEL, HUSTON, INSKEEP, LETH, McKAY, MAHONEY, MONAGHAN, MUSA, RAYMOND, WILLNER

CHAPTER 150

AN ACT

Relating to foreign meat; and providing penalties.

Be It Enacted by the People of the State of Oregon:

Section 1. The purpose of sections 2 to 4 of this Act is to protect the consumers of this state in their choice of meat for consumption.

Section 2. No person shall sell or offer for sale at wholesale or retail, for consumption on the premises or otherwise, any fresh or frozen meat produced in a foreign country unless:

(a) There is displayed conspicuously upon the business premises a sign or signs indicating such meat is imported.

(b) Each package displayed for sale, each cut and each quarter, half and whole carcass of such meat is labeled or branded to indicate the country of origin.

Section 3. Persons selling meat described in section 2 of this Act shall keep accurate records of such sales and keep such records for one year and open for inspection by the State Department of Agriculture during regular business hours.

Section 4. (1) The State Department of Agriculture shall enforce sections 2 and 3 of this Act and the rules made under this section.

(2) The State Department of Agriculture shall by rule provide:

(a) The size, content and placement of signs, labels and brands required under section 2 of this Act.

(b) The content of records required under section 3 of this Act.

(3) No person shall violate any provision of a rule adopted under this section.

Section 5. Violation of any provision of sections 2 to 4 of this Act is a misdemeanor.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

THE TUPMAN THURLOW COMPANY, et al.,	)	
v.	)	Civil Action No. 4164
W. F. MOSS, COMMISSIONER, ETC., et al.,	)	

BEFORE: HARRY PHILLIPS, Circuit Judge, WILLIAM E. MILLER, and FRANK GRAY, JR., District Judges.

PER CURIAM: This action was instituted by the Tupman Thurlow Company, Inc., and the William Davies Company, Inc.,[1] for a declaratory judgment that Chapter 34 of the 1965 Public Acts of Tennessee (See Appendix A), herein referred to as the Labeling Act, and Chapter 367 of the 1965 Public Acts of Tennessee (See Appendix B), herein referred to as the Licensing Act, are violative of the Federal Constitution and therefore void. Injunctive relief also being sought to restrain state officials[2] from enforcing the statutes, a three-judge court was constituted pursuant to 28 U.S.C.A., Secs. 2281 and 2284.

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[1] At the hearing on the merits on January 10, 1966, the plaintiffs moved to dismiss the William Davies Company, Inc., as a party plaintiff, and this motion having been sustained and an appropriate order entered, we refer hereafter in this opinion only to the Tupman Thurlow Company, Inc., as party plaintiff.

[2] In addition to the defendants named in the original complaint, the Tennessee Livestock Association and the Tennessee Farm Bureau Federation, Inc., were permitted to intervene as defendants. They have participated in the proceedings in support of the validity of the Tennessee Acts.

Specifically, the complaint alleges that the Acts violate (1) the Commerce Clause of the Constitution of the United States, Art. I, Sec. 8, in that they constitute an unreasonable burden and restriction upon foreign and interstate commerce, and an effort by the State of Tennessee to levy and collect duties upon foreign goods imported into the State of Tennessee; (2) the Fourteenth Amendment, in that they deprive the plaintiffs of their property without due process of law and deny to them the equal protection of the law; and (3) the Supremacy Clause of the Constitution, Art. 6, in that the Acts are in conflict with acts of Congress which have preempted the field by imposing various regulations and restrictions upon the importation of foreign meat. Since plaintiffs for procedural reasons have abandoned reliance upon the Supremacy Clause of the Federal Constitution, in the light of *Swift & Company, Inc., v. Wickham,* 86 Sup. Ct., 858 (Nov. 22, 1965), and an appropriate order has been entered to that effect, and since we conclude that the Acts must be declared void under the Commerce Clause, we consider in this opinion that provision of the Federal Constitution only, without reference to the Supremacy Clause or the Fourteenth Amendment.[6]

Both Acts challenged in this proceeding were enacted by the 84th General Assembly of Tennessee, the Labeling Act having been passed on February 16, 1965, and the Licensing Act on March 16, 1965. The Labeling Act requires that any person selling or offering for sale in the State of Tennessee any meats or meat foods which are the products of any foreign

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[6] Jurisdiction is properly invoked under 28 U.S.C.A., Sec. 1331; and 28 U.S.C.A., Secs. 2201 and 2202 confer authority to render a declaratory judgment.

country to the United States "shall so identify each product and its foreign origin." If any product is offered for sale in bulk or portions whereby labeling is not feasible, it is provided that "a conspicuous sign in lieu of the label shall be displayed near the stock or display of the product." If foreign meats are combined with domestically produced meat into one product, the product shall be so labeled. In the event preservatives of any kind are used in any packaged meat product, the preservative shall be identified, along with the quantity used, and clearly displayed on any such package. It is provided that all bids submitted on meat and meat products to any tax-supported institution within the state shall contain one of the following labels: "This meat is of foreign origin," or "this meat is domestic meat," or "this is a combination of foreign and domestic meats," the institution being authorized to reject any such bid.

Responsibility for the administration of the Act is vested in the State Commissioner of Agriculture, who is empowered to promulgate regulations to effectuate its provisions. It is provided, however, that "none of said regulations shall require a higher standard of purity and sanitation than is from time to time required by the regulations of the United States Department of Agriculture to govern meat inspection by its agricultural research service." Violations of the Act are made misdemeanors punishable by prescribed fines and jail sentences, which are increased in severity for second and successive offenses.

The Licensing Act requires the registration and the annual licensing of "each person, firm or corporation in the State of Tennessee engaged in the business of manufacturing, buy-

ing, selling, handling, processing, packing, or distributing imported meat products either at retail or wholesale." Imported meat and imported meat products are defined as "meats whose source of origin was beyond the continental limits of the United States and are or will be sold to the ultimate consumer as fresh or raw meat." The Act provides for two classes of licensees: (1) Manufacturers, packers or processors who are required to pay an annual license fee of $1500; and (2) Wholesale dealers or distributors who are required to pay an annual license fee of $500.

Each place of business must be separately registered and licensed. The supervision of the registration and licensing required by the Act are vested in the Foods Division of the Department of Agriculture, whose Commissioner is empowered and directed, when it can be shown that there is a shortage of any native meats, "to authorize the sale or the handling of any meat products by all those required to be licensed by this Act without the payment of the fees required herein." Such authorization shall not exceed ninety days from the time that it is shown that the shortage no longer exists. All registration and license fees are appropriated to the Department of Agriculture, "to be used separately in carrying out the provisions of this Act and none of the funds or fees collected under this Act can be paid to or used for or by any other governmental agency." Any violation of the Act is declared to be a misdemeanor with a fine of not less than $25.00 nor more than $50.00 for each offense, each day on which a violation occurs constituting a separate offense.

Before discussing the substantive issues as to the constitutionality of the Acts when measured in terms of the Com-

merce Clause, we consider first the contentions of the defendants that the plantiff is without standing to challenge the validity of the Acts, and that this Court should abstain from passing upon the issue until a state court has first had the opportunity to construe the Acts and to adjudicate their validity.

The predicate for the defendants' argument that the plaintiff is without standing to challenge the Labeling and Licensing Acts is the fact that the Acts are not directly operative in their requirements against the plaintiff and neither restrain nor require any act on its part, since plaintiff itself handles no meat and has no place of business in Tennessee. It is insisted that plaintiff is in no position to assert the rights of others, such as plaintiff's Tennessee customers upon whom the Acts' exactions and burdens directly fall. This objection would be of substance and would require dismissal of the action if the plaintiff suffered no injury or damage from the enforcement of the Acts, or if any injury or damage suffered by the plaintiff, should be indirect or remote and not direct and immediate. But such is not the case alleged in the complaint, nor, as a brief resume of the pertinent facts will demonstrate, is it the case established by the proof.

Plaintiff is a New York corporation with no office or place of business in Tennessee. For several years it has been engaged in foreign and interstate commerce as a dealer in imported meats. It purchases meat which is grown, slaughtered and packaged in foreign countries, imports such meat into the United States, and resells it within and among the several states of the United States, including Tennessee. Its business is exclusively in interstate or foreign commerce. Its prac-

tice is to solicit orders from customers in Tennessee and then to have the meat imported into the United States in sealed cartons, each of approximately sixty pounds in weight, under conditions of refrigeration which cause the meat to remain hard frozen, and to be delivered in that form to its customers in Tennessee. In addition, plaintiff sells its meat to out-of-state manufacturers and processors having a national distribution. Such imported meat is used by the manufacturers in the processing and manufacturing of canned meats, soups, baby food, frozen food dinners, bologna, hamburgers, frankfurters, and the like. Such products are sold through retail outlets and stores in Tennessee. Wholesale distributors in Tennessee also receive imported meat from the plaintiff which is resold to persons in the State of Tennessee and then manufactured or processed into meat products which are then sold to the public through various retail outlets in Tennessee.

The allegations of the complaint, amply sustained by the evidence, are to the effect that the passage of the Labeling and Licensing Acts by the General Assembly of Tennessee has caused plaintiff's Tennessee customers to refuse to purchase its imported meat, thus for all practical purposes destroying the Tennessee market for its direct sales. Tennessee customers, in refusing to continue their business relationships with plaintiff, have stated as the basis for their refusal to purchase, the burdensome requirements imposed by the Tennessee Acts here in question. The direct and immediate impact of the legislation is graphically shown by the plaintiff's Tennessee sales figures for 1964 and 1965. In 1964, 1,619,991 pounds of imported meat, for a total sales volume of $602,593.45, were sold to Tennessee customers. In contrast,

for the year 1965, 549,013 pounds were sold, for a total sales valume of $214,259.73. It is shown that plaintiff's sales to Tennessee customers terminated in July 1965, the effective date of the Acts, with some minor exceptions which are irrelevant to the present inquiry.

After the issuance of a preliminary injunction to restrain the enforcement of the Acts, some Tennessee sales were renewed, but the volume of such sales is not shown in the evidence. The evidence further justifies the conclusion that the fees imposed by the Licensing Act serve to place the plaintiff's meats in a disadvantageous competitive position and directly contribute to their exclusion from the Tennessee market. Under such circumstances, although the plaintiff is not directly within the terms of the Acts, it nevertheless is so directly and immediately affected by their operation that it has standing to challenge their validity upon the ground that they constitute an undue burden upon interstate commerce. We are of the opinion that this conclusion is supported, by strong analogy if not directly, by the Supreme Court's rulings in *Pierce v. Society of the Sisters,* 268 U.S. 510 (1925); *Truax v. Raich,* 239 U.S. 33 (1915); and *Savage v. Jones,* 225 U.S. 501 (1912).

The defendants' abstention argument is also without substance. It is true that in some respects the statutes under consideration are not entirely free from uncertainty or ambiguity as to their meaning and application. Nevertheless, even construing these statutes in the light most favorable to defendants, they still present problems of constitutional dimensions. No reasonable construction which state courts could place upon the legislation would remove the constitutional infirm-

ity. The abstention doctrine does not require a federal court to withhold the enforcement of a right guaranteed by the Federal Constitution merely for purposes of delay. On the facts of the present case, therefore, the doctrine of abstention is without application, whatever vitality it may still possess in other contexts. *Turner v. Memphis,* 369 U.S. 350 (1962); *Bailey v. Patterson,* 369 U.S. 31 (1962); and *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958).

Turning to the substantive issues, we find no escape from the conclusion that the Labeling and Licensing Acts, whether considered separately or essentially as one regulatory measure, impose unreasonable and discriminatory restrictions and burdens upon interstate and foreign commerce, and so run afoul of the Commerce Clause. The line of demarcation between a permissible and impermissible state regulation affecting interstate commerce has been charted in manifold decisions of the Supreme Court from the earliest days of our Republic to the present time. While the Commerce Clause as construed by the Supreme Court does not prohibit all state regulatory measures affecting interstate commerce, the Supreme Court has invariably outlawed those state restrictions which unduly and unreasonably burden or restrain interstate commerce when evaluated in terms of legitimate state or local interests, or those state restrictions and regulations which unreasonably discriminate against such commerce. *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Voight v. Wright,* 141 U.S. 62 (1891); *Minnesota v. Barber,*

136 U.S. 313 (1890); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The burdensome and discriminatory character of the present legislation can scarcely admit of doubt when it is considered in the light of the pertinent facts. In sweeping terms the Labeling Act requires that "each quarter of each carcass, each carton, each retail package, or individually packaged item, shall be plainly identified with a brand or label stating that it is a foreign product and naming the country of its origin." Direct responsibility for such labeling is imposed upon "any person, firm, or corporation who sells or offers for sale in the State of Tennessee, through packing houses, meat markets, stores, or otherwise, any meat, meat-foods, either fresh, canned, frozen, or cured, which are products of any foreign country to the United States . . . ." The evidence discloses that manufacturers and processors of meat-foods and products, such as weiners, bologna, hamburgers, baby foods, and other products, customarily use foreign and domestic meats indiscriminately without any effort to keep the one separate from the other. The Labeling Act would require such products to be labeled to show the fact of co-mingling and the country in which the foreign meat had its origin. It would be necessary for Tennessee handlers of plaintiff's meat or meat products to keep track of or trace the origin of such meat, purchased either directly or through wholesalers or manufacturers, in order that the ultimate product sold to consumers in the State of Tennessee could be identified and labeled with the country of origin, or labeled in such way as to indicate that foreign and domestic meats both had been used. That these requirements of labeling are exceedingly burden-

some is self-evident. Indeed, it is reasonable to infer that in co-mingling domestic and foreign meats compliance with the Act would be a practical impossibility. Yet these onerous burdens apply under the Act only to foreign meat and to products in which foreign meat is used as an ingredient. Meats produced anywhere within the United States are exempt, with the result that the discriminatory burden on interstate and foreign commerce is unmistakably clear. It can hardly be argued that the burdens of the labeling requirements are materially alleviated by the provision that a conspicuous sign may be used in lieu of the label if any product is offered for sale "in bulk or portions whereby labeling is not feasible," for this provision would not in any way obviate the burden of tracing or determining the origin of meats or of meats used in various meat products, a consequence of the Act which is probably more objectionable than the actual labeling itself.

If we understand the defendants' position, it is not seriously contended that the Licensing Act, considered apart from the Labeling Act, can be sustained as a valid measure under the Commerce Clause. The defendants' theory is that "reading both the Labeling and Licensing statutes together necessitates the conclusion that the purpose of the legislation was to impost a license fee in order to defray the costs of supervising enforcement of these statutes."

Should the Acts be read in pari materia? It is true that there are arguments why this question should be answered in the negative. First, the two Acts, as already indicated, are not co-extensive, in that the Licensing Act is restricted to foreign meat to be sold to the ultimate consumer as fresh or raw meat.

The Labeling Act is not so limited.[9] If the purpose of the Licensing Act was to provide funds to supervise the cost of enforcing the Labeling Act, it is arguable that the incidence of the two Acts would have been the same. Second, the Licensing Act contains no provision referring or relating to the Labeling Act or its requirements. Third, Section 4 of the Licensing Act expressly provides that all funds derived from license fees are "to be used separately in carrying out the provisions of this Act. . . ." If the Licensing Act should be tested on its own merits without reference to the Labeling Act, it is exposed as an arbitrarily excessive and discriminatory burden and embargo on inerstate and foreign commerce. It is not even suggested that the State Treasury would require the substantial fees imposed by this Act to do nothing more than supervise compliance with the limited provisions of the Licensing Act. In addition to the excessiveness of the prescribed fees, no reason appears nor has been assigned for imposing such a burden upon handlers of foreign meat to be sold to the ultimate consumer as fresh or raw meat, while not imposing the same burden upon handlers of domestic meat to be sold to ultimate consumer in the same form. Such an arbitrary im-

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[9] Since retailers are not included by name in Section 3 of the Licensing Act defining the classes of licensees, it could be argued that they are not required to pay the annual license fee, a view apparently adopted by the State Commissioner of Agriculture. Under this construction the Act would be even less comprehensive than indicated above. However, in view of the specific reference to retailers in Section 1, a reasonable construction would appear to be that they are embraced within the term "distributor" in clause 2 of Section 3, and might well be included as "manufacturers" or "packers" in clause 1 of such Section, if they prepared their own hamburger packages, as the testimony showed was the practice of some retailers. This issue of statutory construction need not be resolved for purposes of the present inquiry.

position, having the effect of impeding interstate and foreign commerce, is clearly proscribed by the Commerce Clause. *Nippert v. City of Richmond,* 327 U.S. 416 (1946). That the Ast has an exclusionary purpose is further evidenced by the provision authorizing the Commissioner of Agriculture to excuse the fees altogether "when it can be shown there is a shortage of any native meats."

It seems clear, however, under the Tennessee rule, since the two Acts were passed at the same session of the General Assembly and deal with the same subject matter, that they should be read together as one regulatory scheme. *Gates, et al., v. Long, et al.,* 172 Tenn. 471, 481 (1937); *State v. Allman,* 167 Tenn. 240, 243 (1934). On this basis, assuming that the major purpose of the Licensing Act is to raise funds to supervise enforcement of the Labeling Act, which we hold to be invalid, it would appear that the two Acts would necessarily be required to share the same fate. Furthermore, as so read and construed, the discriminatory character of the statutory exactions in the Licensing Act would still remain, in that there would be no logical or reasonable basis for imposing the substantial burdens of the Act upon handlers of foreign meats while exempting those who handle domestic meats.

Defendants undertake to support the present legislation solely upon the ground that it constitutes a proper exercise of the state's police power to protect the consumer from fraud and deception.[9] It is insisted that for almost a century states

[9] Since the Labeling Act expressly provides that the Commissioner of Agriculture, in implementing the Act, shall issue no regulation requiring a higher standard of purity and sanitation than is required to govern the federal inspection of foreign meat, no serious contention

(Continued on page 47)

have been enacting legislation pursuant to their police power, with the approval of the Supreme Court, to protect citizens from being deceived or misled in their purchase of commodities, especially foods and food products, at retail.

In seeking to answer the question how consumers in Tennessee are misled by the sale of meat in that state which was originally imported, defendants point to the fact that the plaintiff's imported meat is frozen in the country of origin and then imported and sold in its frozen form to citizens in Tennessee and other states. They point to the further fact that most of such imported meat is then processed and sold in the form of frankfurters, bologna, hamburgers, soups, canned foods, baby foods and the like. From these premises the defendants argue, without any factual support in the record, that when a Tennessee consumer purchases such meat, which is of course no longer a frozen product,

> "he obviously things he is buying a fresh product. This is clearly deception regardless of the intention of the seller or the quality of the meat sold. It is not the product but deception in its sale which the Tennessee Legislature hopes

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(Continued from page 46)

can be made that the labeling requirement was designed as a valid health measure under the police power of the state. There is no proof the foreign meat, per se, is unwholesome or impure, or that it poses a health problem. Plaintiff's foreign meats are imported and sold in sealed cartons, labeled with country of origin, and inspected by federal inspectors at port of entry, in accordance with federal laws and regulations which impose standards of wholesomeness and purity. Such foreign meats are deemed and treated as domestic meat within the provisions of 34 Stat. 674. The requirement in the Labeling Act for disclosure of any preservatives used in a packaged product could have been designed as a health regulation, but the difficulty is that its burden falls on foreign meat only with no like requirement as to domestic meat. Such a distinction is purely arbitrary, further emphasizing the discrimination against interstate and foreign commerce.

> to bar by requiring the country of origin be indicated so the consumer may know the exact nature of the meat product he purchases."

In support of this thesis, defendants refer to surveys indicating that consumers prefer fresh over frozen meats, and that the moisture from thawing meat carries away minerals and other nutrients and that re-freezing, commonly done by the unsuspecting consumer, may make the meat less tender and juicy.

The argument is met with a number of insuperable difficulties. There is no evidence that food products, such as those referred to by the defendants, are supposed by a consumer to be a fresh product, in the sense that the meat content has never been frozen, although we may suppose that this could be true as to hamburger meat. Nor is there any evidence that such products are generally offered for sale or represented to the public as fresh products. But whether these assumptions by the defendants are correct or not, it is difficult to see how the Labeling Act could have been design to protect the consumer from deception, when the same protection is not afforded him in purchasing the same products which have been manufactured from frozen domestic meat. If the consumer is entitled to be advised, albeit indirectly, that he is purchasing foreign meats which have been frozen, he is entitled to receive the same information about domestic meats which have been frozen.

The authorities relied upon by the defendants to support their theory that the Labeling Act should be upheld as a reasonable regulation to prevent fraud and deception in sales of food products may be readily distinguished. In *Plumley v. Massachusetts*, 155 U.S. 461 (1894), the Supreme Court up-

held a Massachusetts statute which prohibited the sale of oleomargarine which had been artificially colored to look like yellow butter, a statute which differs from the Labeling Act now under consideration in two important aspects. First, it directly prohibited the sale of a product whose appearance *per se* was deceptive. Second, the prohibition of the Massachusetts statute applied to all artificially colored oleomargarine, whether domestic or foreign. It is significant that the Court in *Plumley* before ruling upon the Massachusetts statute, cited four cases, *Brimmer v. Rebman,* 138 U.S. 78 (1891); *Minnesota v. Barber,* 136 U.S. 313 (1890); *Walling v. Michigan,* 116 U.S. 446 (1886); and *Railroad Co. v. Husen,* 95 U.S. 465 (1877), in each of which a state statute which imposed burdens on wholesome products of other states which were not imposed upon similar products of the home state was invalidated under the Commerce Clause. The *Plumley* ruling simply was that the state's police power does authorize and permit the regulation or commerce in unwholesome food products, or in products whose appearance deceives or misleads the public, provided that the prohibition or regulation does not discriminate in favor of local products. As stated by the Court:

> "If the statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other states, and which had been made in imitation of pure butter, the case would have been wholly different. But we have seen that it is not of that character, but is aimed at all oleomargarine artificially colored so as to cause it to look like genuine butter and offered for sale in Massachusetts."

Similarly, *Crossman v. Lurman,* 192 U.S. 189 (1904), (sustaining the validity of a state statute prohibiting the sale

of adulterated foods, whether domestic or foreign), *Hutchinson Ice Cream Co. v. Iowa,* 242 U.S. 153 (1916), (upholding a state statute challenged on equal protection grounds under the Fourteenth Amendment which prohibited the sale as ice cream of compounnds which did not contain a minimum of butter-fat), and *Hebe Co. v. Shaw,* 248 U.S. 297 (1919), (upholding an Ohio statute prohibiting the sale of condensed milk which was condensed not from whole milk but from skim milk, and made applicable to condensed skim milk which was produced both within the state and without), are inapposite and not controlling for, unlike the present Labeling Act, they involved non-discriminatory regulations reasonably designed to protect the public from deception and fraud. The regulation here involved cannot fairly be construed as a consumer-protection measure, and if it should be, it would be interdicted by the Commerce Clause because it unreasonably discriminates against foreign products in favor of products of domestic origin. For similar reasons, defendants' reliance upon cases upholding various states labeling requirements, such as *Double-Eagle Lubricants, Inc. v. State,* 34 Law Week 2365 (Dec. 10, 1965); *Swift & Company, Inc. v. Wickham,* supra; *National Federal Association, Inc. v. Bradley,* 301 U. S. 178 (1937); *Armour & Co. v. North Dakota,* 240 U.S. 510 (1916); *Savage v. Jones,* 225 U.S. 501 (1912); and *Patapsco Guano Co. v. North Carolina Board of Agriculture,* 171 U.S. 345 (1938); is misplaced, since the regulation in each of these cases was fairly designed to convey pertinent information to the public as to the nature, quality or quantity of the product purchased, and was made applicable to all products of similar nature regardless of their origin, whether

within or without the state. The present labeling requirement, in contrast, would do nothing except to inform the public that a meat product had its origin in a foreign country without conveying any information as to its nature, quality or quantity. In addition, as noted, it imposes substantial burdens upon meat and meat products of foreign origin without imposing the same burdens upon meat and meat products of domestic origin.

It is further insisted by the defendants that the present legislation does not offend the Commerce Clause because it operates only on goods which have come to rest in Tennessee so as to become part of the common property of the state, citing such typical cases as *Gulf Fisheries Co. v. MacInerney,* 276 U.S. 124 (1928); *Texas Co. v. Brown,* 258 U.S. 456 (1922); and *Pabst Brewing Co. v. Crenshaw,* 198 U.S. 17 (1904). The cases cited by the defendants involving the "come to rest" and original package doctrines, merely recognize, because of the nexus with the state thus established, the power of the state to impose taxes or regulations upon those foreign goods which are designed to compete in the domestic market. Conceding that the imported meats in the present case are designed to compete in the domestic market, and that the state therefore has the power to regulate, it remains evident that the state may do so only if the regulations apply equally to foreign and domestic meats, and thus make possible equal competition in the domestic market.

Defendants refer to Sec. 3 of the Labeling Act and suggest that it can be saved by the application of the severability clause, since it contains no arbitrary or discriminatory feature, and since it deals with purchases by the state in its

proprietary capacity. This Section provides that bids submitted in Tennessee to tax-supported institutions shall be labeled to indicate whether the meat or meat products are of foreign origin, of domestic origin, or a combination of foreign and domestic meats, such institutions being authorized to reject any bids. While it is arguable that the Section is nondiscriminatory, when considered apart from other portions of the Act, it is clear that it is capable of being applied administratively to discriminate against imported meats. Even conceding that the Section is not discriminatory, some doubt as to its constitutionality would still remain in view of the burden it would impose on interstate and foreign commerce with no clearly-defined police power purpose. But whether this Section standing alone could survive a test of constitutionality, we need not decide, for we conclude that it cannot be saved by application of the severability clause. As we have found, the dominant purpose of the legislative scheme was to protect the local meat producer from competition with imported products by imposing restrictions and burdens of such character and effect as to exclude such products from the markets of Tennessee.

It is well-settled that a severability clause is merely an aid to construction, not an inexorable command. *Retirement Board v. Alton R. Co.*, 295 U.S. 330, 361, 362 (1935); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). It should not be applied "so as to defeat what appears to be the paramount legislative intent." *Arthur v. State*, 148 Tenn. 434 (1923). "It is to be given a reasonable interpretation and does not operate to save provisions which clearly would not have been inserted except upon the supposition that the entire act was

valid." 16 Am. Jur. 2d, Sec. 187, p. 419. So in this case, absent the restrictions and burdens on imported meats which it was the paramount purpose of the remainder of the legislation to impose in order to exclude them from the Tennessee market, it is our opinion that Section 3, at least in its present form, would not have been enacted.

In accordance with this opinion a form of judgment will be submitted declaring the Labeling Act and the Licensing Act to be in conflict with the Commerce Clause and therefore void, and permanently enjoining the State Commissioner of Agriculture and the State Chemist and Director of Foods Division, Department of Agriculture, from enforcing the provisions of such Acts.

HARRY PHILLIPS
Circuit Judge

WILLIAM ENMILLER
District Judge

FRANK LAY, JR.
District Judge

ATTEST: A TRUE COPY
Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: Guy W. Cooper, D.C.

APPENDIX A

CHAPTER NO. 34
1965 Public Acts of Tennessee

An Act requiring proper identification of imported meats when offered for sale in this state and requiring identification on bids of meat products to state institutions and providing pantlties for violations thereof.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That any person, firm or corporation who sells or offers for sale in the State of Tennessee, through packing houses, meat markets, stores, or otherwise, any meats, meat-foods, either fresh, canned, frozen or cured, which are products of any foreign country to the United States, shall so identify each product and its foreign origin.

Section 2. *Be it further enacted,* That each quarter of each carcass, each carton, each retail package, or individually packaged item shall be plainly identified with a brand or label stating that it is a foreign product and naming the country of its origin. If any product be offered for sale in bulk or portions whereby labeling is not feasible, then a conspicuous sign in lieu of label shall be displayed near the stock or display of the product. When foreign meats are combined with domestically produced meats into one (1) product, it shall be so labeled. In addition, should preservatives of any kind be used in any packaged meat product, the preservative shall be identified, along with the quantity used, and clearly displayed on any such package.

Section 3. *Be it further enacted,* That all bids submitted on meat and meat products to any tax-supported institution within this State shall contain the following language: "This meat is of foreign origin," or "This is domestic meat," or "This is a combination of foreign and

domestic meats." And said institution is hereby authorized to reject said bid.

Section 4. *Be it further enacted,* That the State Commissioner of Agriculture is responsible for the administration of this Act. In the performance of his duties thereof the Commissioner is authorized, empowered and directed to make and promulgate regulations to effectuate the provisions of this Act, but none of said regulations shall require a higher standard of purity and sanitation than is from time to time required by the regulations of the United State Department of Agriculture to govern meat inspection by its agricultural research service.

Section 5. *Be it further enacted,* That this Act and any portion hereof shall not be construed as to be in conflict with Chapter 9 of Title 52 of the Tennessee Code Annotated, but rather as supplementary thereto.

Section 6. *Be it further enacted,* That any person, firm or corporation who shall fail to comply with the provisions of this Act and any portion thereof, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00), or be imprisoned in the county jail not more than thirty (30) days for the first offense. For each second or consecutive conviction of such offense against the provisions of this Act, the fine shall be not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00) nor more than ninety (90) days imprisonment in the county jail, or both such fine and imprisonment.

Section 7. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable, and if any of its sections, provisions, clauses, or parts be held unconstitutional or void, then the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been accepted even if such unconstitutional or void matter had not been included therein.

Section 8. *Be it further enacted,* That this Act shall

take effect from and after July 1, 1965, the public welfare requiring it.

Passed: February 16, 1965.

JARED MADDUX,
Speaker of the Senate,

WILLIAM L. BARRY,
Speaker of the House of Representatives.

Approved: February 24, 1965.

FRANK G. CLEMENT,
Governor.

APPENDIX B

CHAPTER NO. 367
1965 Public Acts of Tennessee

An Act to authorize, require and levy an annual registration or license fee on all persons, firms or corporations engaged in the buying, selling, manufacturing, processing, packing, or distributing imported meat and imported meat products in the State of Tennessee; to define and fix the amount of such license fee; to define the word "imported meat and meat products"; to provide for the administration and enforcement of this Act; to provide the penalty for its violation.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That each person, firm or corporation in the State of Tennessee engaged in the business of manufacturing, buying, selling, handling, processing, packing or distributing imported meat or imported meat products, either at retail or wholesale, shall be required to register and obtain an annual license to be issued by the Foods Division of the Tennessee Department of Agriculture. The licensee shall be issued annually, and the license year shall be for twelve months beginning on July 1 and ending June 30.

Section 2. *Be it further enacted,* That imported meat and imported meat products shall mean only meats whose source of origin was beyond the continental limits of the United States that are or will be sold o the ultimate consumer as fresh or raw meat.

Section 3. *Be it further enacted,* That for the purpose of carrying out the provisions of the registration and the annual license fee the particular type or kind of license fees are classified as follows:

1. Manufacturers, packers, or processors shall register and pay an annual license fee of fifteen hundred dollars ($1,500.00).

2. Each wholesale dealer or distributor shall register and pay an annual license fee of five hundred dollars ($500.00).

Provided further, each place of business shall be separately registered and have a separate license and the license must be displayed in a conspicuous place in each place of business. No license shall be transferable, but a license may be moved from one place or location to another upon written consent and approval of the Commissioner of Agriculture.

Section 4. *Be it further enacted,* That the registration and license herein authorized shall be under the supervision and jurisdiction of the Foods Division of the Department of Agriculture.

Provided however, that the Commissioner is hereby empowered and shall, when it can be shown there is a shortage of any native meats, authorize the use, sale or otherwise handling of imported meat products by all those required to be licensed by this Act without the payment of the fees required herein. But such authorization shall not exceed 90 days from the time that it is shown that the shortage no longer exists.

That all registration and license fees collected under this Act shall be paid into the Treasury of the State, but all such funds are hereby exclusively appropriated to the Department of Agriculture, to be used separately in carrying out the provisions of this Act and none of the funds or fees collected under this Act can be paid to or used for or by any other governmental agency.

Section 5. *Be it further enacted,* That any person, firm or corporation who violates the provisions of this Act or who fails to comply with the provisions of this Act, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense. Each day on which a violation occurs shall constitute a separate offense.

Section 6. *Be it further enacted,* That this Act shall take effect from and after July 1, 1965, the public welfare requiring it.

Passed: March 16, 1965.

WILLIAM L. BARRY,
Speaker of the House of Represenattives.

JARED MADDUX,
Speaker of the Senate.

Approved: Became a law without Governor Clement's signature.